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No. 676

In the Supreme Court of the United States

OCTOBER TERM, 1957

SOL O. SCHLESINGER, PETITIONER

v.

THOMAS S. GATES, JR., Secretary of the Navy

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court granting the Government's motion for summary judgment (R. 58) is not reported. The opinion of the Court of Appeals (Pet. 15-17) is reported at 249 F.2d 111.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1957 (Pet. 18). The petition for a writ of certiorari was filed on December 20, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151, *et seq.*, the Defense Department has the power to debar prospective contractors for reasons which the appropriate officials of that Department have determined render a contractor non-responsible.

2. Whether, in debarring petitioner from receipt of Navy Department contracts, the action of the Secretary of Navy comported with the relevant Armed Services Procurement Regulations, 32 C.F.R. 1.100, *et seq.*

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151, *et seq.*, and the pertinent Armed Services Procurement Regulations, 32 C.F.R. 1.100, *et seq.*, are set forth in the Appendix, *infra*, pp. 17-20.

STATEMENT

This action was brought by petitioner, a manufacturer of uniform caps, to compel the Secretary of the Navy to terminate petitioner's allegedly unlawful debarment from obtaining Navy Department contracts and to expunge from the records of the Department the indicia of that debarment. The District Court for the District of Columbia denied petitioner's motion for summary judgment and granted the Secretary's cross-motion (R. 58). This judgment was affirmed, *per curiam*, by the Court of Appeals for the District

of Columbia Circuit (Pet. App. 18). The relevant facts, as alleged in the pleadings, and the proceedings below may be summarized as follows:

Schlesinger is engaged in the business of manufacturing and selling uniform caps, under the name Ideal Uniform Cap Company, his principal customer being the Government (R. 1-2). By letter dated August 10, 1955, petitioner was notified by the Department of the Navy that he had been debarred from receiving Navy contracts until June 30, 1956 (R. 6-7). The letter, which stated that this debarment was effective throughout the Department of Defense, gave two grounds therefor. First, it was asserted, Schlesinger had refused to answer questions and make his books and records available to the Investigations Subcommittee of the Permanent Senate Committee on Government Operations,[1] and had pleaded the Fifth Amendment in connection with an income tax investigation relating to the profits from his business. The second ground for debarment specified that Schlesinger was in default under a prior contract with the Navy Department (R. 6-7). The cap supply contract in question had been terminated by the Navy Department on July 1, 1955, for default on the part of the contractor—Schlesinger having failed to deliver 15,000 caps by May 31, 1955, and having again failed to deliver 15,000 caps by June 30, 1955, as required

[1] The investigation covered the procurement practices of the Armed Services Textile and Apparel Procurement Agency, and concerned itself with evidence of waste, inefficiency, graft, and corruption relative thereto. S. Rep. No. 1380, 84th Cong., 2d Sess.

by the terms of the contract. (R. 28, 39-40). See, *infra*, pp. 9-11.

Petitioner "promptly protested the action of the Department of the Navy in debarring him to the Comptroller General of the United States" (R. 2), and also had numerous discussions and conferences with Navy Department officials who were charged with responsibility in the matter (R. 48-49). In conjunction with the foregoing, petitioner and his attorney presented, in detail, Schlesinger's views as to why he should not have been debarred (R. 48-49). These protests were unsuccessful in having the debarment rescinded (R. 2, 48-49).

On April 20, 1956, the present action was instituted in the District Court (R. 1-5). The complaint alleged that the debarment action of the Navy Department was wrongful, in that under the pertinent Armed Services Procurement Regulations (ASPR) the petitioner's conduct before the Senate Subcommittee in refusing to produce his books and records, and his pleading of the Fifth Amendment, did not constitute grounds for debarment (R. 4). It was further contended that the question of petitioner's default under a specific Navy supply contract was in dispute before an administrative board at the time of debarment and was, at the time of the filing of the complaint, pending before the Court of Claims (R. 3-4). See, *infra*, pp. 10-11. Petitioner charged that the Secretary's action was in violation of the Fifth and Eighth Amendments, and alleged additionally that the notice of debarment was procedurally defective in that it did not comply with Defense Department regulations requir-

ing that the debarment notice shall, *inter alia*, "afford the contractor a reasonable opportunity to present information for consideration in his behalf" (R. 4). *Infra*, p. 20. Schlesinger requested that the court declare the debarment to be unauthorized and illegal, and order its termination for the balance of the debarment period (two months and ten days), and also that the court require that the debarment be expunged from the records of the Navy and Defense Departments (R. 5).

Subsequent to the filing of affidavits by both parties, first petitioner and then the Secretary moved for summary judgment (R. 56-57). The District Court denied Schlesinger's motion, and granted the Secretary's cross-motion which was based upon petitioner's lack of standing to sue and the propriety of the debarment under the applicable statute and regulations (R. 58).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed, *per curiam* (Pet. 18). The appellate court, assuming "for present purposes, without so deciding, that appellant has standing to maintain this suit" (see *infra*, p. 6), held that the Secretary was authorized to debar contractors for breach of contract under the Armed Services Procurement Act and implementing regulations, and that Schlesinger's default in performance was sufficient to sustain the Secretary's debarment action (Pet. 16-17).[2] The court further held, on the basis of the

[2] The court commented marginally, that although "[w]e need not and do not reach this question", in the absence of a regulation or contract provision making refusal to furnish

undisputed record, that there had been substantial compliance with the regulation which provides that the contractor is to have "a reasonable opportunity to present information for consideration in his behalf" (Pet. 17).

ARGUMENT

The court below, in upholding petitioner's long-expired debarment as a lawfully-authorized consequence of his prior contract default, has sustained the Secretary's action on a narrowly circumscribed basis.[3] The ground chosen, nevertheless, is sufficient

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information and records about the performance of a Government contract a basis for termination and debarment, it is not clear whether refusal to furnish records to a Congressional Committee could lead to debarment (Pet. 17).

[3] The Government had contended that petitioner lacked standing judicially to contest what was, in effect, a refusal on the part of the Defense Department to do business with him. Reliance was placed upon the well-established principle that prospective bidders on Government contracts have no litigable rights arising out of the refusal of Government officers to deal with them, and that statutes and regulations governing the contracting procedures of these officers are enacted solely for the benefit of the Government and confer no enforceable rights upon persons dealing with it. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *B. F. Cummins Co.* v. *Burleson*, 40 App. D.C. 500; *Friend* v. *Lee*, 221 F. 2d 96 (C.A.D.C.); *Wooldridge Manufacturing Co.* v. *United States*, 235 F. 2d 513 (C.A.D.C.). In view of the sufficiency of petitioner's default as a basis for debarment, the Court of Appeals found it unnecessary to pass on this point or, as noted above, to determine whether petitioner's refusal to furnish records and information relative to performance of a Government contract to a Congressional committee was a lawful debarment ground (Pet. 16-17).

by itself and derives full support from the relevant provisions of the Armed Services Procurement Act of 1947, and the implementing regulations.

1. Petitioner's primary contention is that debarment of contractors by the Armed Services has no statutory foundation. In meeting this argument, initial consideration must be given to Section 3(b) of the 1947 Act, 41 U.S.C. 152(b) (*infra*, p. 17).[1] It is there provided that contract awards made pursuant to advertisement for bids, the basic procurement device, are to be made "to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered." *Infra*, p. 17. The scope of this authorization, with its deliberately flexible criteria, is best defined by the report of the Senate Armed Services Committee accompanying the bill which was subsequently enacted into law. S. Rep. No. 571, 80th Cong., 1st Sess. This report describes Section 3 of the Act in the following terms (at p. 16):

> This section establishes broad standards for advertising. * * * Other matters which may properly be covered by administrative regulations include the rejection of offers of any person who as principal or surety has been a defaulter on previous contracts with the Depart-

[1] On August 10, 1956, Congress enacted into positive law, as Title 10 of the United States Code, a codification of the laws relating to the Armed Forces, including those laws governing procurement. 70A Stat. 1, *et seq.* The relevant provisions of the Armed Services Procurement Act of 1947 are now found in 10 U.S.C. 2301-2314. No substantive change has been made in the 1947 Act by the codification.

ment, rejection of bids having nominal or fictitious prices, and barring as a contractor a person who is not a manufacturer or a regular dealer in the articles which he offers to supply.

Section 3(b) states that contracts shall be awarded to the lowest responsible bidder whose bid will be most advantageous to the Government, price and other factors considered, and that the Government may reject all bids when such action is deemed advisable. The question whether a particular bidder is a "responsible bidder" requires sound business judgment, and involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors. The service concerned with the procurement of goods of the type dealt in by the bidder is naturally best qualified to make this evaluation, and broad discretion is accordingly reserved to the service in this respect. In virtually all cases this will result in an award to the lowest responsible bidder. However, it will also provide for situations where the public interest dictates an award to someone other than the lowest responsible bidder.

Thus, it is plain that, while Congress has enjoined in certain other statutes, which promote specific social or economic goals, that contractors violating the provisions of those statutes are to be denied receipt of Government contracts,[5] under the

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[5] Walsh-Healey Act, 49 Stat. 2037, 41 U.S.C. 37; Davis-Bacon Act, 46 Stat. 1494, as amended, 49 Stat. 1011, 40 U.S.C. 276a-2; Buy American Act, 47 Stat. 1520, 41 U.S.C. 10b(b).

basic procurement act for the Armed Services, Congress purposefully left to administrative determination the decision as to which other categories of contractors the Defense Department will not deal with and the grounds for non-dealing. Pursuant thereto, regulations were issued by the Defense Department to implement its statutory functions and responsibilities.[6] These regulations, as held by the court below, authorized the action taken by the Secretary in the present case.

2. Section 1.604-1(b)(2) of the Armed Services Procurement Regulations (ASPR) provides that the Secretary may order debarment upon clear and convincing evidence of (32 C.F.R. 1.604-1(b)(2); *infra*, p. 19):

> A history of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that the previous failure or failures by the Contractor are within a reasonable period of time preceding the determination to debar. Failure to perform caused by acts beyond the control of the Contractor shall not be considered.

Petitioner's performance under the cap supply contract cited by the Secretary (R. 7) had been

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[6] It should be noted that, whereas debarment in the statutorily-prescribed instances is designed as a penalty, different considerations motivate administrative debarment pursuant to the "responsible bidder" provision of the Armed Services Procurement Act. Here, the moving factor is safeguarding the integrity of the military procurement programs, and debarment or suspension "will be for the purpose of protecting the interest of the Government and not for punishment". Section 1.605, ASPR, 32 C.F.R. 1.605.

unsatisfactory to the Navy Department in that Schlesinger had failed to deliver 15,000 caps by May 31, 1955, and again failed to deliver 15,000 caps by June 30, 1955, as required by the terms of the contract (R. 39-40).[5] The contractor's conduct resulted in two distinct actions by the Navy Department. On July 1, 1955, the contracting officer terminated petitioner's contract pursuant to a termination clause in the contract (R. 10); and on August 10, 1955, the Navy Department debarred petitioner from receiving Navy contracts until June 30, 1956, assigning as one ground therefor his default under the above cap contract (R. 6-7).

The action of the contracting officer in terminating the existing contract was subject to a special administrative appeal and, if found erroneous, termination would be deemed to have been made for the convenience of the Government, entitling the contractor to certain prescribed contractual rights and benefits (R. 14).[6] See also 32 C.F.R. 7.103-11. However, the

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[5] The contract further provided that preproduction samples of component parts and completed end items were to be submitted by the contractor for approval by the clothing supply officer pursuant to a prescribed time schedule. Petitioner also failed to submit satisfactory preproduction samples and components as required (R. 25).

[6] The petitioner appealed the contract termination to the Armed Services Board of Contract Appeals where it was affirmed by the Navy panel on October 31, 1955 (R. 42). The panel held that the failure to deliver by May 31, 1955, was without fault or negligence on petitioner's part and that timely delivery for that period was waived by the contracting officer (R. 39), but that the failure to deliver 15,000 caps in June constituted a fresh default enabling the Government

separate determination of the Secretary to debar petitioner from receipt of future contracts, based in part upon his unsatisfactory performance under the terminated contract, was not subject to this appeal procedure, but to the entirely distinct debarment regulations. Schlesinger's efforts, pursuant to those regulations, to have the debarment rescinded (*infra*, pp. 12-13) were unsuccessful, and the initial decision was properly left standing.[9]

3. Petitioner takes issue also with the debarment procedure employed by the Secretary. He contends that his debarment was procedurally defective in that the notice transmitted failed to afford him an opportunity to be heard, as required by regulation, and that, in any event, such an opportunity must antedate debarment (Pet. 13-14, 17).

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to terminate on July 1, 1955 (R. 40). Upon motion for reconsideration, this determination was subsequently affirmed by the entire Board on December 20, 1955 (R. 47). Petitioner is presently contesting the administrative determination by a suit against the Government for breach of contract in the Court of Claims (R. 7-11).

[9] Petitioner attempts to place significance upon the fact that after the debarment action, which was based in part upon the default under the cap supply contract, the Navy awarded a contract for reprocurement to petitioner's surety on the terminated contract and approved the surety company's subcontracting of the work to petitioner (Pet. 6). This, however, is permitted by ASPR 1.603-1, 32 C.F.R. 1.603-1, when it is to the Government's interest to have the debarred contractor do the work. Since the surety was primarily responsible for performance under the latter arrangement, and petitioner had taken steps toward performance under the terminated contract, the Navy Department's reprocurement action, which would minimize both the surety's and petitioner's loss, is understandable.

The regulation in question (Section 1.604-3, ASPR, *infra*, pp. 19-20) provides that the contractor concerned shall be furnished with written notice of debarment within 30 days after the determination to debar has been made—the notice to state the period of debarment, the reasons therefor, and that debarment is to be effective throughout the Department of Defense. It provides, in addition, that the notice of debarment shall "afford the contractor a reasonable opportunity to present information for consideration in his behalf." *Infra*, p. 20. Here, notice was given petitioner of the debarment determination, as required by the regulation (R. 6-7). Thereafter, the contractor was to be afforded a reasonable opportunity to present arguments to alter the Secretary's determination (*infra*, p. 20). The notice did not state that petitioner was to have such an opportunity; but even assuming that such a statement should have been included—which is certainly not clear from the regulation—petitioner, as held by the Court of Appeals (Pet. 17), was afforded that opportunity.

Petitioner does not dispute the affidavit filed by Albert C. Kornblum, Assistant to the General Counsel of the Navy Department (R. 48-49).[10] Mr. Kornblum made the following sworn statements (R. 48-49): Petitioner together with his attorney conferred with

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[10] Mr. Kornblum's official duties included rendering legal advice to the Chief of Naval Material and to personnel on his staff whose duties pertained to the Consolidated List of Debarred, Ineligible and Suspended Contractors. He was, in addition, a member of the Committee authorized to represent the Secretary in taking appropriate action in debarment cases (R. 48).

the affiant at length about the debarment in controversy, stating their position in detail. In addition, petitioner had personal conferences with the Assistant Secretary of the Navy for Material, the Special Assistant for Procurement, the Deputy General Counsel of the Navy, and others—the subject of these conferences being petitioner's debarment and his protests. Mr. Kornblum concluded that the Navy Department officials charged with responsibility in the matter had been fully apprised of petitioner's position (R. 49).[11] Thus, it may be seen, as the Court of Appeals held (Pet. 17), that the "record discloses substantial compliance" with the regulation, petitioner being afforded a reasonable opportunity to present his position.

Petitioner's further assertion that debarment cannot be effected without a prior hearing (Pet. 13-14), is untenable. Plainly, such was not the requirement of the regulation in question (*infra*, pp. 19-20). Nor does the fact that the right to a hearing accrued after the initial agency determination to debar, in and of itself, deprive the contractor of due process, as petitioner implies.[12] Cf., *Fahey* v. *Mallonee*, 332 U.S. 245, 253; *Yakus* v. *United States*, 321 U.S. 414, 436, 443. Moreover, although petitioner stresses the "importance of this aspect of the case", insofar as it bears on future debarment proceedings involving other con-

[11] Petitioner, moreover, protested his debarment to the Comptroller General. The latter concurred in the Secretary's action (R. 2).

[12] This, of course, assumes that petitioner had a legal right to have the Government accept him in the future as a contractor. Cf., *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

tractors (Pet. 14), it should be noted that changes effected in the Armed Services Procurement Regulations within the past year obviate the problem under the Act in question.[13]

4. Petitioner's own debarment period has, of course, long since expired (*supra*, p. 3). He asserts, nevertheless, that certiorari should be granted since this case presents an opportunity to limit debarment to instances where specifically authorized by statute, and that this must be effected before administrative debarment "mushrooms to unmanageable proportions" (Pet. 8). These assertions, however, must be viewed in the light of the fact that administrative debarment of persons or firms which contracting agencies of the Government have determined to be non-responsible has been sanctioned by

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[13] Section 1.604-3, ASPR (as revised May 23, 1957) provides as follows:

Notice of Debarment

(a) The firm or individual concerned shall be furnished with a written notice of the proposed debarment stating as a minimum: (i) the fact that debarment is being considered; (ii) the reasons for the proposed debarment; and (iii) the period of time to be afforded to present information for consideration. If debarment is effected, the firm or individual shall be notified in writing within 10 days after determination of debarment has been made. This notice shall (i) reference the earlier notice of proposed debarment, (ii) specify the reasons for debarment, (iii) state the period of debarment, including effective dates, and (iv) advise that the debarment is effective throughout the Department of Defense. If, following the notice of proposed debarment, a determination is made that the debarment will not be effected, the firm or individual shall be notified in writing accordingly. * * *

the Comptroller General over a period of nearly thirty years.[14] See, *e.g.*, 7 Comp. Gen. 547; 14 Comp. Gen. 313; 17 Comp. Gen. 877; Dec. Comp. Gen. B-112861, Nov. 25, 1952. The present case is, to our knowledge, the first judicial contest of such a debarment; and, more significantly, Congress itself has seen fit to intervene only to the extent of *requiring* debarment for certain offenses (*supra*, p. 8).

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[14] The Congressional "watchdog" in this area is the Comptroller General, whose duty it is to investigate such expenditures of public funds to determine whether the relevant statutes and regulations have been complied with and the interests of the Government protected, and to report his findings to the Congress. See, *e.g.*, Act of June 10, 1921, 42 Stat. 25, 26, 31 U.S.C. 53, 54; Act of August 2, 1946, 60 Stat. 837, 31 U.S.C. 60; Act of September 12, 1950, 64 Stat. 834, 31 U.S.C. 65, *et seq.* The Comptroller General specified at an early date that (7 Comp. Gen. 547-8):

> * * * the length of time of such debarment [must be] definitely stated and not unreasonable, and the reasons for the debarment, with a statement of the specific instances of the bidder's dereliction [must be] made of record and a copy thereof furnished the bidder * * *.

Compare, ASPR, §§ 1.604-2, 1.604-3 (*infra*, pp. 19-20).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1958

APPENDIX

1. The Armed Forces Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151 *et seq.*, provides as follows in pertinent part:

> Sec. 3. Whenever advertising is required—
>
> (a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.
>
> (b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

2. The Armed Services Procurement Regulations, 32 C.F.R. 1.100, *et seq.*, provides as follows in pertinent part:

> § 1.600 *Scope of subpart.* This subpart prescribes policies and procedures relating to the debarment of bidders for any cause, ineligibility of bidders under section 1a of the Walsh-Healey Public Contracts Act (41 U.S.C. 35a), and the suspension of bidders for alleged fraud or other criminal conduct.
>
> * * * *
>
> § 1.601-1 *General.* Each Department shall establish and maintain a consolidated list of firms and individuals to whom contracts will not be awarded and from whom bids or proposals will

not be solicited, in accordance with the provisions of this subpart.

* * * *

§ 1.602 *Basis for addition of firms and individuals on list.* The names of firms or individuals shall be included on the list in the following categories:

* * * *

(c) Those which the Secretary of a Department or his authorized representative determines to debar administratively for any of the causes and under all of the conditions set forth in § 1.604.

* * * *

§ 1.604 *Causes and conditions under which departments may debar contractors.* The Secretary of each Department or his authorized representative is authorized to debar in the public interest a firm or an individual for any of the causes and under all conditions set forth in § 1.604-1. Debarment of a firm or individual by the Secretary of a Department or his authorized representative shall operate to debar such firm or individual throughout the Department of Defense.

§ 1.604-1 *Causes for debarment.* (a) Conviction by or a judgment obtained in a court of competent jurisdiction for (1) commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a contract, and (2) violation of the Federal anti-trust statutes arising out of the submission of bids or proposals. In the event appeal taken from such conviction or judgment results in reversal, the debarment shall be removed upon receipt of notification thereof. * * *

(b) Clear and convincing evidence of violation of contract provisions, as set forth below, when such violations are of a character regarded by the Secretary of the Department involved or his

authorized representative to be so serious as to justify debarment actions.

(1) Wilful failure to deliver in accordance with the specifications or within the times of delivery provided in a contract.

(2) A history of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that the previous failure or failures by the Contractor are within a reasonable period of time preceding the determination to debar. Failure to perform caused by acts beyond the control of the Contractor shall not be considered.

(3) Violation of the contractual provision against contingent fees.

(4) Violation of the contractual provision against gratuities, as determined by the Secretary of a Department in accordance with the provisions of the gratuities clause.

(c) Debarment for any of the above causes by some other executive agency of the Government. Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon a combination of additional facts with the record of facts of the original debarring agency.

§ 1.604-2 *Period of debarment.* All debarments shall be for a reasonable, definitely stated period of time, commensurate with the seriousness of the offense. As a general rule, a period of debarment shall not exceed 5 years following the date of conviction for fraud or other criminal offense, or 3 years following the date of debarment for any other cause. In the event debarment is preceded by suspension, consideration will be given to such period of suspension in determining the period of debarment.

§ 1.604-3 *Notice of debarment.* (a) The firm or individual concerned shall be furnished with written notice of the debarment within 30 days after determination of debarment has been made. The notice shall state, as a minimum, (1) the

period of debarment, including effective dates; (2) the reasons for debarment, including a statement of the specific instances of dereliction; and (3) that the debarment is effective throughout the Department of Defense. The notice shall also afford the contractor a reasonable opportunity to present information for consideration in his behalf.

* * * *

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